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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ROY L. RYAN
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

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PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgement of the U.S. Court of Appeals for the Fifth Circuit in the above mentioned case, entered October 12, 1988.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the panel decision conflicts in principle with Yates v. United States, which reversed a jury

determination where the jury was allowed to consider inappropriate overt acts in reaching the conspiracy verdict?

2. Whether the Panel Decision conflicts with Yates v. United States, 354 U.S. 298 (1957), Mills v. Maryland and Stromberg v. California through its holding allowing the jury to consider non overt acts as overt acts in determining whether there was evidence of a conspiracy, when the Supreme Court has consistently held that conspiracy verdicts must be set aside if the reviewing court cannot be certain which of two grounds was relied upon by the jury in reaching the conspiracy verdict?

3. Whether Pinkerton charge induced convictions for substantive offenses can support a conspiracy conviction, when the Pinkerton charge induced convictions could be based on the above invalid jury determination of conspiracy?

4. Whether the Panel Decision allowing a jury determination of conspiracy based on consideration of non overt acts, conflicts with the Yates v. Aiken, Francis v. Franklin, Sandstrom, In re Winship, line of Supreme Court cases holding it a violation of due process requiring reversal to allow a conviction where the government was not required to "prove `every fact necessary to constitute the crime with which [the defendant] is charged' beyond a reasonable doubt"?

5. Whether the Panel Decision allowing a jury determination of guilt through vicarious liability for substantive offenses, based on a Pinkerton charge which relies on the above invalid determination of a conspiracy, conflicts with the Yates v. Aiken, Francis v. Franklin, Sandstom, In re Winship line of Supreme Court cases

holding it a violation of due process requiring reversal to allow a conviction where the government is not required to "prove `every fact necessary to constitute the crime with which [the defendant] is charged' beyond a reasonable doubt."?

6. Whether the Panel Decision upholding a wire fraud jury instruction which permitted the jury to conclude that intent to bring about "financial gain" was sufficient to constitute intent to defraud for purposes of violating the wire fraud statute conflicts with the United States v. McNally holding of this Court that "financial gain" is not sufficient to support a violation, but rather an intent to cause deprivation of "property" is required?

7. Whether the Panel Decision allowing a jury determination of wire fraud under jury instructions which

permitted the jury to conclude that intent to bring about "financial gain" was sufficient to constitute intent to to defraud for purposes of determining wire fraud violations, conflicts with the Yates v. Aiken, Francis v. Franklin, Sandstrom, In re Winship line of Supreme Court cases holding it a violation of due process requiring reversal to allow a conviction where the government is not required to "prove `every fact necessary to constitute the crime with which [the defendant] is charged' beyond a reasonable doubt"?

8. Whether a conviction of wire fraud based on a bank's unilaterally wiring money to the defendant to honor an insufficient funds check that was previously hand delivered to the defendant by a title company at a land closing conflicts with this Court's decision in Kann v. United States which held that "[i]t cannot be said that the

[wirings] in question were for the purpose of executing the scheme, as the statute requires"?

9. Whether the Panel Decision allowing the general conspiracy verdict to stand when the jury instructions on certain substantive offenses are invalid, conflicts with Sandstrom v. California?

LIST OF PARTIES

The parties to the proceeding below were Petitioner Roy L. Ryan, Tyrell Barker, a/k/a Terry Barker, Laurence B. Vineyard, Jr., and the United States of America.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, NO. 87-1683, was rendered on October 12, 1988. The unreported opinion affirming the conviction of Petitioner is reprinted in the appendix hereto at A.

JURISDICTION

Federal jurisdiction was invoked under 28 U.S.C. 1291, in that Petitioner appealed from a final decision of the United States District Court for the Northern District of Texas.

On Petitioner's appeal, the Court of Appeals for the Fifth Circuit entered its opinion on October 12, 1988, affirming the District Court conviction after trial by jury. Petitioner's Motion for Panel Rehearing was denied on November 9, 1988. See Appendix B. Petitioner's Motion for Stay of Issuance of Mandate Pending Application to this Honorable Court for a

Writ of Certiorari was denied on November 30,1988.

The jurisdiction of the court to review the judgement of the Court of Appeals for the Fifth Circuit is invoked under 28 U.S.C. 1254(1) (1948).

CONSTITUTIONAL PROVISIONS, AND STATUTES INVOLVED

The pertinent provisions of the United States Constitution and the pertinent statutory provisions are as follows:

> Amendment V, United States Constitution.
> No person shall...be deprived of life, liberty, or property, without due process of law....
>
> Wire Fraud, 18 U.S.C. 1343 (1956).
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice,

> shall be fined not more than $1,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

This appeal arrises from Petitioner Roy L. Ryan's convictions for one count of conspiracy under a general conspiracy verdict; two counts of wire fraud; and three counts of false statements to a federally insured institution.

On June 26, 1986, Petitioner Ryan and ten others were charged by an indictment that was dismissed on December 19, 1986 when it was superseded by a new indictment filed on December 10, 1986. Petitioner Ryan, along with six co-defendants, was charged in the eighteen count superseding indictment with conspiracy to violate six separate felonies, submitting false statements to a federally insured savings and loan association, wire and mail fraud and aiding and abetting the commission of the listed offenses.

On January 13, 1987 Petitioner Ryan and codefendants Barker and Vineyard were tried to a jury before the Honorable Halbert O. Woodward. Spikes, Brooks and McCallister earlier had entered pleas of guilty and charges against Hurst had been dismissed on December 30, 1986.

Importantly, Petitioner initially was indicted for a conspiracy alleged to have begun on August 1, 1983.

The above referenced superceding indictment alleged that the conspiracy began on June 1, 1983.

On the morning of trial, after the jury had been empaneled, while at a bench conference held immediately prior to opening statement, the government told the trial court that the conspiracy began on August 25, 1983 and that the eleven overt acts that preceded that date should be redacted from the indictment. The Court submitted the unredacted indictment to the jury to utilize in its

deliberations and instructed the jury, inter alia, that it must find, beyond a reasonable doubt, that one of the conspirators committed one of the listed overt acts during the existence of the conspiracy, and that act further the conspiracy.

The Court instructed that:

> What the evidence in the case must show beyond a reasonable doubt is:
>
> One: That two or more persons, in some way or manner, positively or tacitly came to a manual understanding to try to accomplish a common and unlawful plan as charged in the indictment.
>
> Two: That the defendants willfully became a member of such conspiracy.
>
> Three: That one of the conspirators during the existence of the conspiracy knowingly committed at least one of the means or methods or overt acts described in the indictment.
>
> And Fourth: That such overt act was knowingly committed at or about the time alleged in an effort to affect or accomplish some object or purpose of the conspiracy. (Court's Charge, page 17).

The jury was also given the Pinkerton charge, which allowed the jury, once the conspiracy was proven, to find Ryan guilty for the successive, substantive counts under an agency theory of vicarious liability.

The Court instructed

> Now, if you find that a defendant is guilty of conspiracy as charged in Count 1, you may also find the defendant guilty of a substantive offense as charged in any other count of the indictment provided that you find that the essential elements of that count [the conspiracy] as defined in these instructions, have been established beyond a reasonable doubt and provided that you also find beyond a reasonable doubt:
>
> First, that the offense defined in the substantive count was committed pursuant to the conspiracy and, second, that the conspiracy--that the particular defendant was a member of the conspiracy at the time substantive offense was committed.
>
> Now, under these conditions just defined, a defendant may be found guilty of a substantive count even though he did not participate in the acts constituting the offense as defined in the substantive count. The reason for this is that a co-

> conspirator committing a substantive offense, pursuant to a conspiracy, is held to be an agent of the other conspirators. (Count's Charge, pp.24-25).

Petitioner Ryan was convicted of one count of conspiracy, three counts of aiding and abetting the submission of false financial statements to a federally insured agency, and two counts of wire fraud. Petitioner Ryan was acquitted of all four mail fraud counts and the remaining six wire fraud counts.

On August 27, 1987, the court sentenced Appellant Ryan to five years on the conspiracy count; two years on each false statement count to be served consecutively to the conspiracy count, but concurrently with each other, and three years on the two wire fraud counts, to be served concurrently with each other and the misapplication counts, but consecutively to the conspiracy charge. Ryan was ordered to serve a total of eight

years in prison, fined $22,000 and ordered to pay restitution.

Petitioner Ryan filed a timely Notice of Appeal to the Court of Appeals for the Fifth Circuit. Jurisdiction was invoked under 28 U.S.C. 1291, since Petitioner appealed from a final decision of the United States District Court for the Northern District of Texas.

Upon appeal to the Fifth Circuit Petitioner Ryan challenged the District Court convictions on numerous grounds, requiring reversal; including (1) prejudicial variance between proof and indictment; (2) that the conspiracy count was duplicitous; (3) that the conspiracy charge asserted two offenses misjoined in one count; (4) that there was insufficient evidence that Petitioner joined in the conspiracy charged, or that he aided and abetted the creation of false financial statements; (5) that the government

was not required to meet every element of proof to sustain a conviction against Petitioner in violation of constitutional due process, since by the government's own admission the jury was given various alleged "overt acts" to consider in determining whether there was a conspiracy, which the government conceded should have been redacted as they were not overt acts; (6) that the above error in requiring proof in every element of proof to sustain a conspiracy conviction required not only reversal of the conspiracy conviction but the substantive offenses as well, since a Pinkerton charge was given allowing vicarious liability for the substantive offenses upon the jury's determination of proof of a conspiracy; (7) that under Fed. R. Evid. 404(b) the district Court erred in not clearly instructing the jury that evidence regarding the extraneous acts which the government

conceded should have been redacted was being received only to show "motive" and "intent"; (8) that the trial court gave erroneous jury instructions on the wire fraud count, and there was failure of factual proof on the creation and submission of false statements to a federally insured institution, (9) any one of the above errors in the jury instructions or failure of factual proof for the substantive offense requires reversal of the conspiracy convictions since when one conspiracy alleges multiple objections and there is a general conspiracy verdict, a deficiency, legal or factual, pertaining to one of the conspiracy's multiple objects, requires reversal under Stromberg v. California, 283 U.S. 359 (1931), and (10) that Petitioner's five year sentence for conspiracy is illegal because, under the Stromberg rationale, the jury could have rested its guilty

verdict on its finding that Petitioner conspired to violate Section 1014, a two year offense.

In summarizing the Court of Appeals decision as it relates to affirming the convictions against Petitioner Ryan, the decision found there was no fatal variance between the indictment and the proof at trial, on the grounds that Petitioner's concern about charging government conceded pre-conspiracy non overt acts as overt acts is not prejudicial because (1) it did not effectively alter the charging terms of the indictment; (2) that the variance "does not change the government's theory of the case" and that "defendant's substantial rights are not affected"; (3) that Petitioner is effectively "complain[ing] that the indictment charged more than was necessary,"; (4) that "the appropriate remedy is to ignore that part of the indictment that is

unnecessary in proving the offenses."; (5) that "the government need not prove the exact point in time at which the conspiracy began"; (6) that "no matter when this conspiracy actually began, the evidence shows that the government proved the same conspiracy that was alleged in the indictment and that Ryan voluntarily participated in that conspiracy"; (7) that "Ryan was not prejudiced" "by the court's failure to redact certain overt acts from the indictment before it was submitted to the jury" though "the government concedes that those acts should have been stricken"; (8) even if those acts weren't overt acts "they were relevant to show the background of the charged conspiracy and therefore admissible"; (9) "the record shows that the jury did not rely on these overt acts". "Ryan was convicted on five substantive offenses, each of which was listed as an

alleged overt act and each of which occurred after the commencement of the conspiracy." "Since acts occurring outside the scope of the proved conspiracy did not form the basis for Ryan's conspiracy conviction, he was not prejudiced by their inclusion in the indictment.",

(10) For the reasons above, and also for the reason that none of the defendants requested an instruction under Fed. R. Evid. 404(b) regarding receipt of the evidence regarding the above non-redacted acts merely to show "motive" and "intent", the Court of Appeals also found that Petitioner could not rely on Fed. R. Evid. 404(b) to argue "that he was prejudiced by the instruction of evidence regarding the extraneous overt acts."

Importantly Petitioner Ryan would note that the Court of Appeals decision nowhere adresses his critical argument, based on Yates v. United States, 354 U.S.

298, 311-312 (1957), that this Honorable Court has previously held that it is reversible error for a jury to rest a determination of proof of guilt of conspiracy on inappropriate overt acts. This Court in Yates, supra, held that because the Court was unable to determine that the jury rested its conspiracy verdict on proof of overt acts within the statutory time limit, the conspiracy conviction had to be reversed.1/

The Court of Appeals also

1/ As discussed infra, there is no way the Court could determine that the general conspiracy verdict was based on overt acts rather than the acts which the government conceded as acts that should have been redacted. Moreover, the substantive offense convictions, which refer to overt acts occurring after the acts which the government conceded should have redacted, cannot with certainty demonstrate that the jury relied on appropriate overt acts, since a Pinkerton charge was given allowing vicarious conviction of Petitioner Ryan for the substantive offenses even if he committed none of the acts supporting the substantive offenses, upon finding a conspiracy.

specifically stated that it did not address Petitioner Ryan's contention that upon finding error regarding the conspiracy conviction that the substantive offense convictions must be reversed as well, since a Pinkerton charge was given the jury.2/ The Court of Appeals found that "[b]ecause we have affirmed the conspiracy convictions in this case, we need not address this issue."

As related to the above Yates argument, the Court of Appeals also did not address Petitioner's correlative argument, that to allow a conspiracy conviction to rest on acts that do not constitute overt acts

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2/ As this Court is aware, United States v. Pinkerton, 328 U.S. 640 (1946) holds that a defendant may be convicted for substantive offenses committed by his co-conspirators even if he did not participate in them, upon a valid finding that he was part of the general conspiracy. Here, of course, the conspiracy determination is based on reversible error.

violated due process, since the Court, in effect, allowed the government to make its case without proving every essential element of the criminal conspiracy charge.

Petitioner Ryan would likewise note that in ruling upon Petitioner's challenge to the jury instructions and the inadequate factual proof to support the substantive offenses referenced supra, the Court of Appeals did not address the point that a ruling in Petitioner's favor on any one of those issues relating to the substantive offenses would also require reversal of the conspiracy conviction, under Stromberg v California, 283 U.S. 359 (1931) 3/

3/ As the Court is aware, Stromberg v. California, held that when one conspiracy alleges multiple objections and there is a general conspiracy verdict of guilty, a deficiency, legal or factual, pertaining to one of the conspiracy's multiple objects, will require reversal.

In ruling on Petitioner Ryan's challenge to the **sufficiency of evidence** to support the **conspiracy convictions** the Court of Appeals found that (1) "the record demonstrates that there was sufficient evidence to show both the existence of the conspiracy and the knowing participation of each appellant in it."; (2) that "Ryan relayed instructions from Barker and Vineyard 4/ to Spikes to set up two shell corporations to handle the `land flip'" 5/ Ryan then purchased the land to be used in the `flip', had the land appraised at a drastically inflated value", 6/ and "assisted in the preparation of various

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4/ A lawyer.

5/ Petitioner Ryan was a real estate agent who bought and sold land.

6/ There is conflicting evidence in the Record on this assertion even by the government's own witnesses.

"assisted in the preparation of various fictitious financial statements", 7/ and (3) that "[t]he evidence amply demonstrates that appellants knew of the conspiracy's essential purpose; therefore, they need not have been aware of or participated in each and every aspect of the conspiracy."

In ruling upon Petitioner Ryan's contention that there was insufficient evidence to prove he conspired to make false statements to Brownfield Savings and Loan, 8/ the Court of Appeals found "the verdict stands if the evidence is sufficient with respect to any one of the acts charged. [citations omitted] On this

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7/ This is likewise disputed by the Petitioner, infra.

8/ Petitioner had pointed out there were not even any evidentiary allegations by the government referencing alleged acts in which he allegedly conspired against Brownfield Savings and Loan.

basis this court has previously held that when a conspiracy to commit multiple substantive offenses is alleged, a general verdict may properly be sustained if there is sufficient evidence to support on any one of the multiple objectives."9/

In ruling on Petitioner Ryan's contention that the evidence was insufficient to support the creation of false financial statements for Brooks and McCallister for a loan with Key Savings, because the government failed to prove Petitioner was aware that the statements were overvalued, the Court of Appeals concluded "the evidence regarding [the financial statements] fully supports Ryan's conviction."

9/ Petitioner would note his challenges, for example, that the conspiracy conviction itself was erroneous because it cannot be determined that it was not based on the government conceded non-overt acts that should have been redacted.

The Court of Appeals likewise ruled against Petitioner on the duplicitous joinder of two offenses in one alleged conspiracy issue, on the basis that "[b]y failure to challenge this alleged duplicity before trial, Ryan failed to preserve the issue for appeal.... His attempt to avoid this problem...is foreclosed....To constitute reversible error, a misjoinder must result is actual prejudice to an accused's substantial rights...Ryan has shown no such actual prejudice."

The Court of Appeals ruled against Petitioner Ryan's challenge that the wire fraud jury instruction was erroneous under McNally v. United States, __U.S.__ 107 S.Ct. 2875 (1987) because the instruction permitted a guilty verdict without showing the property deprivation required by McNally, on the Court of Appeals' rationale that the court's instructions "made clear that the jury could convict

only upon finding that the scheme to defraud involved a deprivation of property."10/

Finally, the Court of Appeals rejected Petitioner Ryan's assertion that the five year sentence for conspiracy under the general conspiracy verdict violates due process since one of the object offenses provides for a maximum sentence of two years. The Court of Appeals reasoned that "[o]nly in situations in which the underlying offense is a misdemeanor is `the punishment for conspiracy ... the maximum punishment for such misdemeanor.'" Under 18 U.S.C. Section 371,"... a conspiracy is a separate crime which merits separate punishment; that punishment can be even

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10/ As discussed infra, Petitioner Ryan respectfully submits that the instructions themselves clearly demonstrate otherwise.

more severe than the punishment for the completed substantive offense."11/

REASONS FOR GRANTING THE WRIT

The issues raised in Petitioner Ryan's application to the Supreme Court cut to the very core of fundamental fairness and due process in the criminal justice system. In considering the type of issues herein dictating respect for human freedom, and requiring the government to prove every element of its charges before depriving a defendant of liberty, the Supreme Court has repeatedly reaffirmed that strictly requiring the government to meet its elements of proof by requiring the appropriate elements of proof to be before the jury for its

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11/ Petitioner Ryan respectfully submits that even assuming the validity of the above sentencing ruling, the ruling highlights the egregiousness of the effect of the Panel Decision since the referenced conspiracy conviction is not based on proof of all the essential elements of conspiracy beyond a reasonable doubt.

determination of guilt, "protects the fundamental value determination of our society . . . that `it is far worse to convict an innocent man than to let a guilty man go free'". Yates v. Aiken, infra, quoting Justice Harlan in Winship, infra.

In all due respect, the Circuit Court in the instant case carefully refused to address the critical controlling arguments raised by Petitioner in his briefs and at oral argument. The lower Court opinion is loaded with specious, boiler-plate responses which do not control when fundamental, "bedrock" Supreme Court precedent of the nature raised herein is applicable.

From a practical as well as a substantive standpoint the substantial issues presented to the Supreme Court in this case represent a textbook example of the constitutional and judicial policy

conflicts in logic, rationale, and law a District or Circuit Court will quickly find themselves in if they attempt to justify and sustain a failure to provide a defendant one of the most fundamentally valued assurances of the criminal justice system: the assurance that the government be required to prove beyond a reasonable doubt every essential element of proof of the charges against the defendant.

As discussed and demonstrated in detail below, the effect of this decision is to sustain a conviction on conspiracy and wire fraud, when the conviction was allowed on less standards of proof than required to sustain conspiracy or wire fraud convictions. Indeed, since a Pinkerton conspiracy charge was given allowing vicarious conviction on other substantive counts once a conspiracy was found under the lesser standards of proof

herein, the error spread to the substantive offense convictions, requiring reversal on all counts.

To the contrary, assurances are provided American citizens that before taking the most basic of all human rights, liberty, the government is strictly required to abide by and strictly prove correct elements of proof necessary to support a particular charge.

These basic American protections and respect for human freedom are fundamental to our criminal justice system, are emblazoned in our federal constitution requiring due process, are embodied in the elements of required proof to sustain a criminal charge, are further implemented through our Federal Rules of Criminal Procedure, and are justly championed by the decisions of the United States Supreme Court.

Granting this Petition for a Writ of Certiorari is clearly warranted since the Panel Decision conflicts with several lines of Supreme Court decisions requiring reversal of criminal convictions when the district court has failed to require the government to prove the essential elements necessary to support a criminal charge.

1. THE DECISION BELOW CONFLICTS IN PRINCIPLE WITH SUPREME COURT DECISIONS RULING ON APPROPRIATE JURY CONSIDERATION OF THE ESSENTIAL ELEMENT OF OVERT ACTS NECESSARY TO SUSTAIN A CONSPIRACY CONVICTION, AND DIRECTLY CONFLICTS WITH SUPREME COURT DECISIONS REQUIRING REVERSAL WHERE THE REVIEWING COURT CANNOT BE CERTAIN WHICH OF TWO GROUNDS WAS RELIED UPON BY THE JURY IN REACHING THE CONSPIRACY VERDICT.

It is, without a doubt, undisputed by the government and the Panel Decision that Petitioner Ryan's jury was told that in its consideration of whether the government met its elements of proof of the conspiracy charge it could use acts which the trial court, the prosecutor and the

Circuit Court now acknowledge are not overt acts (because they occurred prior to August 25, 1983), as a basis for determining whether the government met its proof of the conspiracy charge.

Here, eleven events between June 1 and August 25, were characterized by the Court and prosecutor to the jury as overt acts upon which the jury could rest a conspiracy conviction. This representation by the Court (Court Charge, p. 17) and by the prosecutor (Closing Argument, p. 210) was absolutely not true because the court had found and the government agreed that the conspiracy began not on June 1, but on August 25, and the eleven "overt acts" between those dates were not overt acts upon which the jury could rest a conspiracy conviction.12/

12/ While it is true that the government need not prove the exact point the conspiracy began, here the government specifically stated it began on August 25. It

A conflict in principle of tremendous impact regarding the elements essential to proving a conspiracy is thus presented to the Supreme Court in this case. The Supreme Court has previously held that it is reversible error for a jury to rest a determination of proof of guilt of conspiracy on inappropriate overt acts. Because the Supreme Court was unable to determine that the jury rested its conspiracy verdict on proof of overt acts within the statutory time limit, the Supreme Court in Yates v. United States, 354 U.S. 298, 311-312, (1957), reversed the conviction. Accord, Mills v. Maryland, 108 S.Ct. 1860, 1866 (1988); Stromberg v. California, 283 U.S. 359, 367-368 (1931); United States v. Pepe, 747 F.2d 632, 664, (11th Cir. 1984).

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claimed it knew the date and specifically stated that the eleven overt acts prior to August 25 were not overt acts.

Moreover, as supported by this Court as recent as June of 1988, the Panel Decision directly conflicts with Supreme Court decisions requiring reversal where the reviewing court cannot be certain which of two grounds was relied upon by the jury in reaching the conspiracy verdict:

> "With respect to findings on criminal charges, the Court consistently has followed the rule that the jury's verdict must be set aside if it could be supported on one ground but not on another, and the reviewing court was uncertain which of the two grounds was relied upon by the jury in reaching the verdict. See eg., Yates v. United States 354 U.S. 298, 312 (1957), Stromberg v. California 283 U.S. 359, 367-368(1931)."

The parallel application of the principle of Yates, for example, to this case is exact, because the court can not determine that the government was required to prove its conspiracy charge with appropriate overt acts.

Indeed, from a fundamental fairness

standpoint the circumstances and the substantial issues raised for reversal herein are even more compelling in this case, because the jury in Yates was presented with overt acts outside statutory time limits, while the acts allowed to be considered as proof of conspiracy herein are now undisputed to be non overt acts!

Yates v. United States, 354 U.S. at 311-312, reversed a conspiracy conviction for organizing and advocating the overthrow of the United States because the overt acts that supported the organizing prong of the charge were time-barred by the statute of limitations. Because the Supreme Court was unable to determine that the jury rested its verdict on overt acts within the statutory limit, it reversed the conviction. The Yates case is the law today and is virtually identical to the case at hand because the jury

in this case could have rested its conspiracy conviction on a non overt act prior to August 25, 1983, and then relied upon the Pinkerton charge to find Ryan guilty of the substantive counts that occurred within the conspiracy's life. United States v. Pepe, 747 F. 2d at 664 (11th Cir. 1984), also specifically held that it was error to submit time barred overt acts to a jury to consider as evidence in formulating a conspiracy. The court stated ". . . the district court's failure to strike the [time barred] overt act was error." Id. at 664.

The panel opinion states that because Petitioner was convicted of substantive counts that occurred after August 25, then ". . . acts occurring outside the scope of the proved conspiracy did not form the basis for Petitioner's conspiracy conviction [and] he was not prejudiced by their inclusion

in the indictment." (Opinion, p. 26). The Court cites United States v. Saenz, 747 F.2d 930, 937, (5th Cir. 1984), cert denied, 473 U.S. 906 (1985) as support.

With all due respect, Petitioner contends that the panel opinion ignores the effect of the Pinkerton instruction which allowed the jury to convict on the substantive charges without regard for Petitioner's involvement in those charges if the jury found proof of a conspiracy. In Saenz, there was no Pinkerton charge and the substantive count had sufficient independent evidence. It is thus irrelevant in this case whether there was sufficient independent evidence of the substantive counts because the appellate court is forbidden to substitute its judgement for that of the jury.

An appellate court cannot know whether the jury followed the Pinkerton instruction and found Ryan guilty of the

substantive counts because it found he was a member of a non existent conspiracy that operated from June 1 to August 25. The government must prove beyond a reasonable doubt each element of the offense of conspiracy.

Petitioner is entitled to have the government prove the evidence against him beyond a reasonable doubt on each and every count. This is required by the Due Process Clause of the Constitution. Eg., In re Winship, 397 U.S. 358, 362 (1970); Hamling v. United States, 418 U.S. 87, 1117 (1974); Brinegar v. United States, 338 U.S. 160, 174 (1949).

An exception is made for crimes committed in furtherance of a conspiracy because conspirators are considered each others' agents. This exception only pertains if the conspiracy conviction is validly obtained. However, if the conspiracy conviction is flawed and a

Pinkerton charge is given, then the appellate court cannot substitute its judgement that there the jury independently considered evidence for conviction on the substantive counts. This is because the appellate court (a) cannot know that the jury disregarded the Pinkerton instruction and (b) because of this uncertainty, an accused, such as Ryan, might have been convicted without the jury finding that the government had proven each element of each count beyond a reasonable doubt because the jury might have applied the agency theory of vicarious liability expressed in Pinkerton.

Petitioner's jury was told it could (a) use acts which the trial court, the prosecutor and the Circuit Court acknowledged are not overt acts as a basis for a conspiracy conviction and then, once guilt for the conspiracy was determined, the jury was told (b) it could find

Petitioner guilty of any substantive, successive counts without considering the evidence against him on those counts.13/

The Circuit Court Panel concluded that because the jury found Petitioner guilty of substantive counts that occurred after August 25, the jury could not have relied on the pre-August 25 non overt act to find him guilty of conspiracy. This specious, tautological, i.e. circular, reasoning, counsel respectfully submits, is wrong. The panel opinion does not address the problem raised by Yates and the illogic of using Pinkerton induced convictions on post August 25th substantive counts to hold that the jury

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13/ As this Court recently reaffirmed, the standard and question upon appellate review "`is not what the [Fifth Circuit] declares the meaning of the charge to be, but rather what a reasonable juror could have understood the charge as meaning' citing Sandstrom v. Montana,442 U.S. 510, 516-517 (1979)"; Mills v.Maryland, __U.S.__, 108 S.Ct. 1860, 1866 (1988).

properly convicted Ryan initially for conspiracy using overt acts (i.e., substantive counts) that occurred after August 25.

The panel also misstates Ryan's position by adopting the government's characterization that Ryan ". . . complains that the indictment charged more than was necessary," citing United States v. Miller, 471 U.S. 130 (1985). In Miller, the Court rejected the claim that Miller was denied due process because the grand jury would not have returned an indictment if it knew the narrower proof that would be offered at trial. The Supreme Court did not hold in Miller that the government does not have the burden of proving each element beyond a reasonable doubt. Miller is no support to show Ryan was not prejudiced when the jury was told that eleven events were overt acts and evidence allowed to prove

conspiracy and the jury was told that they could rest a conspiracy conviction upon proof beyond a reasonable doubt of any one of them.

The Circuit Court's misreading of Miller thus also in effect overrules and conflicts with Yates v. United States, because the panel's interpretation of Miller allows for convictions on invalid premises.

In all due respect, the Court of Appeals thus ducked the controlling issue now before this Court which is whether there has been a violation of Petitioner's due process rights.

Petitioner Ryan therefore respectfully requests this Honorable Court to address directly the issue of whether a conspiracy conviction can rest upon non overt acts and whether convictions for post-conspiracy counts (alleged as overt acts) can support a conspiracy conviction

when those count convictions were induced by a Pinkerton charge.

The Panel Decision plainly conflicts with prior Supreme Court case law. Under the circumstances of this case the elements of proof considered by the jury were less than those required to sustain a conspiracy conviction, and based on an inadequate proof of an essential element of conspiracy the Pinkerton charge acted in this case to allow a less than adequate consideration of proof of the substantive charges in violation of Petitioner's due process rights.

2. THE DECISION BELOW CONFLICTS WITH SUPREME COURT DECISIONS PROTECTING FUNDAMENTAL DUE PROCESS RIGHTS BY REQUIRING REVERSAL WHERE THE LOWER COURTS FAIL TO ASSURE THAT THE GOVERNMENT MUST PROVE EVERY ESSENTIAL ELEMENT OF CRIMINAL CHARGES BEYOND A REASONABLE DOUBT.

As previously discussed, the effect of the decision herein is to sustain a conviction of conspiracy, when the

conviction was allowed on less standards of proof that required to sustain a criminal conspiracy conviction.

Indeed, since a Pinkerton conspiracy charge was given allowing vicarious conviction on other substantive counts once a conspiracy was found under the lesser standards of proof herein, Petitioner likewise submits that the conviction on all substantive offense counts herein must likewise be reversed. The substantive count convictions themselves must be reversed, since the jury could have erroneously assigned vicarious liability to Appellant Ryan for the substantive count convictions under the Pinkerton charge, when it erroneously found proof of a conspiracy based on non overt acts.

To the contrary, this Honorable Court has repeatedly reaffirmed that assurances must be provided American citizens that before taking the most

basic of all human rights, liberty, the government is strictly required to abide by and strictly prove every essential correct element of proof necessary to support a particular charge.

As previously stated, these basic American protections and respect for human freedom are fundamental to our criminal justice system, are emblazoned in our federal constitution requiring due process, are embodied in the elements of required proof to sustain a criminal charge, and are justly championed by the decisions of this Court.

Indeed, this Court has recently re-affirmed its determination to strictly require the government to meet its proper elements of required proof through such decisions as Yates v. Aiken, __U.S.__, 108 S.Ct. 534 (1988) and McNally v. United States, __U.S.__, 107 S.Ct. 2875 (1987).

For example, in repeatedly

reaffirming the importance of requiring the government to meet every element of proof required to sustain a conviction, the Supreme Court as recent as January of last year held in Aiken, supra:

> "Sandstrom v. Montana made clear that the Due Process Clause of the Fourteenth Amendment prohibits the state from making use of jury instructions that have the effect of relieving the State of the burden of proof enunciated in Winship...Today we reaffirm the rule of Sandstrom and the wellspring due process principle from which it was drawn."

Aiken, 108 S.Ct. at 538.

> "Our opinion in Francis explained why a challenge of this kind is supported by the Federal Constitution. The Due Process Clause of the Fourteenth Amendment `protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged'...This `bedrock, axiomatic and elementary [constitutional] principle,' id., at 363, prohibits the State from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime.[citations ommitted] The prohibition protects the fundamental value

> determination of our society,' given voice in Justice Harlan's concurrence in In re Winship, that `it is far worse to convict an innocent man than to let a guilty man go free.' 397 U.S., at 372. See Speiser v. Randall, 357 U.S. 513, 525-526 (1958).' 471 US., at 313.

Aiken, supra at 526. (Emphasis supplied).

Short of strict adherence to the above assurances of proof, we are soon faced with the abhorrent consequence, as here, of sending potentially "innocent" citizens to jail without requiring the government to sufficiently establish their guilt.

The direct departure from well established constitutional and Federal procedural precepts and policies assuring that required elements of proof will be strictly respected before taking away one's freedom, demands no less attention and no less bold pronunciations in this case to "protect the most fundamental of values of our criminal justice system."

At a minimum, therefore, fundamental fairness requires that Petitioner Ryan's conviction be reversed since his conviction was obtained and affirmed based on less proof than required to sustain his guilt.

In relying on the Francis v. Franklin, Sandstrom, In re Winship line of Supreme Court cases for support that "the prosecution must prove every fact necessary to constitute the crime with which [the defendant] is charged' beyond a reasonable doubt", Rose v.Clark, __U.S.__, 106 S.Ct. 3101 (1986), Petitioner respectfully submits this is clearly not the type of situation discussed in Rose, supra, where "Chapman's harmless-error standard applies" Id at 3108-3109.

Indeed, as discussed in Rose, 106 S.Ct. at 3108, for example, the Court cannot conclude that "the jury had found,

in In re Winship's words, `every fact necessary' to establish every element of the offense beyond a reasonable doubt." (Emphasis supplied) The court cannot say "beyond a reasonable doubt" that "the jury has found" "every fact" for "every element" because as previously discussed, the jury could have relied on non overt "facts" or acts for the overt act element of the conspiracy charge. Moreover, because a Pinkerton charge was given, the jury did not have to rely on any "facts" for proving any of the "elements" of the substantive offenses upon erroneously finding Petitioner guilty of conspiring based on the non overt "facts".

Petitioner respectfully submits, therefore, consistent with Rose, that this Court cannot conclude beyond a reasonable doubt that the constitutional error was harmless and that the case should not be reversed. Rose, 106 S.Ct. at 3109.

Though, as stated in Rose, 106 S.Ct. at 3109, "we `do so sparingly'", the circumstances of this case, further exacarbated by the Pinkerton charge, give rise to a case where this Court can and should exercise its "plain authority" to rule that the error is not a harmless error. Id.

At a minimum, as recognized in Rose, supra at 3109, since "the Court of Appeals has not yet applied Chapman to the facts of this case [this Court should] therefore remand to that Court for determination of whether the error committed in this case was harmless beyond a reasonable doubt."

3. THE DECISION BELOW CONFLICTS WITH RECENT SUPREME COURT DECISIONS INTERPRETING THE PROOF NECESSARY TO SUPPORT A WIRE FRAUD CONVICTION.

The prior issues of whether the government was required to prove each element of the charges plainly supports justification for granting the Petition

for a Writ of Certiorari and reversing the lower court decision.

However, there is another issue also concerning the strict requirement that the government prove the correct elements of the criminal charges beyond a reasonable doubt that is a good example of other substantial issues being raised in this appeal. Indeed, it is a good example of the severe prejudice and violation of due process to Petitioner Ryan caused by the government's being allowed to present a case to the jury on less standards of proof than required to support a criminal conviction.

On the wire fraud charges the district court instructed the jury that:

> To act with intent to defraud means to act knowingly with specific intent to deceive someone, ordinarily for the purpose of causing some financial loss or bringing about some financial gain to oneself. (emphasis supplied).

Considering the severe prejudice to

Appellant Ryan, it is time that it come out on the table that the government itself has even recognized that after United States v. McNally, 107 S. Ct. 2875 (1987), a scheme or intent to defraud for the purposes of bringing about financial gain no longer is considered to violate the mail and wire fraud statutes.

The above jury instruction allowed the jury to find proof of intent to commit wire fraud by the government if it found the defendant brought about some "financial gain" to himself.

Yet, after McNally, the Justice Department informed its United States Attorneys that mail or wire fraud may no longer be proved by alleged schemes for financial gain. In a "Memorandum to All United States Attorneys", dated July 29, 1987, and later released to the private bar, entitled "Impact of the McNally Decision", Assistant Attorney General

William F. Weld recognized that McNally "held that a scheme which would result in a gain of money or property to the defendants does not violate the statute. Instead, the Court required that a loss of the victim's property rights must be plead and proved." See also, "U.S. Prosecutors Reel in Wake of Mail Fraud Ruling," The National Law Journal July 20, 1987; "The Convictions That Weren't, The McNally Bombshell." Volume 2, Number 4, Criminal Justice, American Bar Association, (Winter 1988).

Inclusion of the "financial gain" language in the jury instruction was prejudicial to Petitioner Ryan as it allowed the jury to conclude Petitioner's alleged "intent to defraud", through a determination that he "gained" money in the banking wire transactions, when McNally requires specific intent to deprive the institution of money or

property.14/

The possibility that the jury concluded that the "intent to gain" was sufficient to constitute "intent to defraud" is sufficient to require reversal of the wire fraud counts.

Indeed the Fifth Circuit recently rejected an attempt by the government to mitigate its error in providing incorrect instructions after McNally. In United States v. Huls, 841 F.2d 109 (5th Cir. 1988), the defendant was accused of defrauding the State of Louisiana under a right to honest government theory by depriving the State of "...material information," as well as other faithful services. Though this charge was

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14/ To compound the error, while the court's instruction asserted that the statute has a specific intent element, no separate, specific intent instructions were given to assure that the jury understood that "intent to defraud", for wire fraud purposes, is not proven by a defendant's "financial gain."

conceded as erroneous after McNally, the government also argued that the accused deprived the State of a property right, the right to management of its mineral wealth. The Court rejected this argument and held:

> We express no opinion on this assertion, for it is beside the point at issue before this Court. Even if the jury could have convicted Huls and Miller on the same evidence under a correct view of the elements of the offense, the conviction cannot stand if there is a real possibility that the jury convicted on an incorrect view. As the McNally court held:
>
> Although the Government now relies on the assertion that the petitioners obtained property by means of false representations to Wombwell, ...there was nothing in the jury charge that required such a finding. We hold, therefore, that the jury instruction on the substantive mail fraud count permitted a conviction of conduct not within the reach of section 1341. 107 S.Ct. at 2882. ("required" and "permitted" emphasis supplied by the court).
>
> . . .Because the indictment and jury instructions in the instant case permitted the jury to convict on this now invalid theory, we reverse.

Huls, 841 F.2d at 110, 112.

The wire fraud instruction in this case thus indisputably allowed ". . . a real possibility that the jury convicted on an incorrect view." Id.

To allow the wire fraud conviction to stand clearly violates Appellant Ryan's due process rights to require a conviction on the proper elements of proof beyond a reasonable doubt, as previously discussed.

As likewise inconsistent with the Panel Decision in Huls, it is not "clear" in this case "that the jury could convict only upon finding that the scheme to defraud involved a deprivation of property." (Panel decision herein at 30.) Indeed, the Panel Decision itself notes that the mens rea specific intent to defraud definition which is the paramount standard of proof that must be met for the government to establish proof of

"intent" to commit wire fraud, included a definition of "intent to defraud" "for the purpose" of "bringing about some financial gain to oneself". Id. at note 16.

Clearly, therefore, a substantial issue is raised as to whether the jury could have erroneously concluded the government established proof of wire fraud through an element of intent to commit wire fraud that is no longer considered by the Supreme Court or the government itself to violate the law.

Appellant Ryan's well recognized due process rights to have the government prove beyond a reasonable doubt the essential elements of the alleged charges, plainly justifies a grant of the Petition for a Writ of Certiorari and reversal.

Indeed, although the lower court decision failed to address this Court's decision in Stromberg, supra, the

erroneous prejudicial jury instruction on the wire fraud charge likewise requires reversal of the general conspiracy verdict.

Counsel would also note yet another wire fraud issue. It is widely recognized that proof that the wires or mails were used "in furtherance of the alleged fraudulent scheme" is essential, and that the role that the wires or mails play will vary from case to case. Vol. 2, Bricker, Corporate Criminal Liability, Section 8:33 at 28 (Callaghan, 1984).

Consistent therewith, the instant case also involves a close question as to whether the use of the wires herein was "merely incidental and collateral to the [alleged] scheme and not a part of it." Kann v. United States, 323, U.S. 88, 94 (1944). Petitioner had already personally received a check at the land closing from the title company herein which was

later returned insufficient funds. It seems therefore, that the bank's subsequent wiring of the funds without Petitioner's knowledge to correct the error of the title company would be "merely incidental and collateral to the [alleged scheme] and not a part of it," Id. While, as opposed to Kann, it might be argued that "the persons intended to receive the money had [not] received it irrevocably," id., Petitioner had personally received the check at the closing, and "[i]t was immaterial to [him]" "how the bank" on which the check was drawn or the title company would honor the check. "It cannot be said that the [wiring] in question [was] for the purpose of executing the [alleged] scheme, as the statute requires." Kann, supra at 94.

Petitioner would submit therefore that he did "irrevocably receive the proceeds" upon receipt of the hand

delivered check, as the title company as well as the bank obviously intended to honor the check. Kann, 323 U.S. at 94.

CONCLUSION

For all the reasons stated herein, Petitioner Ryan humbly submits that a Writ of Certiorari should issue to review the opinion of the Fifth Circuit.

As recognized by the Supreme Court itself, the type of issues raised herein are the kind of fundamental, bedrock issues of our criminal justice system that assure justice.

Absent respect for such issues by the courts we are faced with the prospect that an innocent man is being deprived of his freedom, when the Supreme Court has recognized that strictly requiring the government to meet "its burden of persuasion beyond a reasonable doubt of every essential element of a crime. . .

protects the fundamental value determination of our society that `it is far worse to convict an innocent man than to let a guilty man go free'." Yates v. Aiken, supra.

"The purpose of that rule is to ensure that only the guilty are criminally punished." Rose, supra at 3107. [quoting the above value determination as well] (Emphasis supplied).

Surely, adherence to such noble American values respecting human freedom warrants exercise of this Court's authority to grant a Writ of Certiorari, to summarily reverse, or at a minimum, to remand to the Court of Appeals "for determination of whether the error committed in this case was harmless beyond a reasonable doubt" "under the Chapman standard." Rose, supra at 3109.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Hiram C. Eastland, one of the attorneys for Petitioner herein, am a member of the bar of the Supreme Court of the United States, hereby certify that on the 7th day of January, 1988, I served copies of Petitioner's foregoing Petition for a Writ of Certiorari on the party hereto by mailing three copies of said document by United States mail, in duly addressed envelopes, with postage pre-paid, to each of the following persons:

Honorable Charles Freed,
Solicitor General,
Department of Justice,
Washington, D.C. 20530